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SCANNED ON 5/7/2007

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. ROLANDO T. ACOSTA Justice PART 61

Index Number : 601636/2006
NC TWO LP
VS
G2 GLOBAL LLC
Sequence Number : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

is motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	See attached
Replying Affidavits	

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED
MAY 07 2007
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: May 1, 2007

SO ORDERED

ROLANDO T. ACOSTA J.S.C.
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

NC Two, L.P., as successor in interest to Bank of America, N.A., successor in interest to Fleet National Bank,

Plaintiffs,

– against –

G2 Global, LLC and Oleg G. Genshaft,

Defendants.

DECISION/JUDGMENT

Index No. 601638/06

Seq. No. 1

Present:

Rolando T. Acosta
Supreme Court Justice

The following documents were considered in reviewing plaintiff's motion and order dismissing defendants ten affirmative defenses pursuant to CPLR 3211, and granting summary judgment against defendants, and defendant's cross-motion for partial summary judgment dismissing the third cause of action (against Genshaft on a personal guarantee):

Papers	**Numbered**
Notice of Motion, Affirmation & Affidavit	**1 (Exhibits A-L)**
Notice of Cross-Motion, Affirmation & Affidavit	**2**
Reply Affirmation	**3 (Exhibits A-B)**

Background

According to plaintiff, on or about November 4, 2002, defendant G2 Global applied to Fleet National Bank ("Fleet") for a business line of credit, and Fleet offered G2 Global a business line of credit of $14,000 pursuant to the terms of a Fleet Small Business Credit Express Agreement. G2 Global accepted the terms of the agreement by using the line of credit and borrowed $14,000, which defendant Genshaft personally guaranteed. G2 Global then defaulted on the loan.

Fleet subsequently merged with Bank of America, and Bank of America assumed all of Fleets rights, title and interest in and to the agreement. Thereafter, on or about November 15, 2005, Bank of America sold its rights, title and interest in and to the agreement to plaintiff NC Two. At that point, there remained a balance of principal and interest on the agreement in the amount of $17,448.18. By letter dated January 25, 2006, plaintiff demanded payment in the amount of $18,596.55, but defendant did not make a payment or objected to the account. Although a copy of this letter is not attached to the moving papers, a letter dated December 5, 2005, attached as plaintiff's Exhibit K, demand payment of $17,448.

In his complaint, plaintiff asserts four causes of action, breach of contract, reasonable attorneys fees, breach of the personal guarantee, and account stated. Defendant raised ten affirmative defenses, see Answer, plaintiff's Exhibit D, none of which have any merit.

Plaintiff now moves for summary judgment on all four causes of action even though it does not possess the original agreement or the guarantee. Rather, relying on NY UCC 3-804, plaintiff has submitted an affidavit from Brad Hreben, NC Venture (plaintiff's general partner)'s Senior Vice President and Chief Information Officer, and attached certain documents to establish its ownership of the agreement, the circumstances for its loss, and the terms of the agreement. These documents include: (1) a Lost Instrument Affidavit prepared by a Vice President of Bank of America, attesting that it was the lawful owner and holder of an instrument executed by G2 Global on November 4, 2002 with an obligation to pay the original principal sum of $14,000, to the order of Fleet; (2) a copy of the loan application, signed by defendant Genshaft as president of G2 Global and agreeing to be personally liable as a guarantor under the personal guarantee; (3) a copy of a Fleet Small Business Line of Credit Agreement; (4) the underwriter's approval of the agreement for $14,000 at a rate of 9.5%; (5) a copy of the order approving the merger of Fleet and Bank of America; (6) an allonge dated November 15, 2005, and executed by the Bank of America, made part of the original agreement, indicating that the original amount of $14,000 was to be paid to the order of NC Two; and, (7) the Loan Sale Agreement between the Bank of America and NC two, whereby the Bank of America sold the G2 Global loan (outstanding balance at that juncture was $17,448) to NC two.

Analysis

It is well settled that the proponent of a motion for summary judgment must establish that "there is no defense to the cause of action or that the cause of action or defense has no merit," (C.P.L.R. §3212[b]), sufficiently to warrant the court as a matter of law to direct judgment in his or her favor. Bush v. St. Claire's Hospital, 82 N.Y.2d 738, 739 (1993); Winegrad v. New York University Medical Center, 64 N.Y.2d 851, 853 (1985). This

standard requires that the proponent of the motion "tender[] sufficient evidence to eliminate any material issues of fact from the case," id., "by evidentiary proof in admissible form." Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions." C.P.L.R. §3212(b).

Where the proponent of the motion makes a prima facie showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so. Vermette v. Kenworth Truck Company, 68 N.Y.2d 714, 717 (1986); Zuckerman v. City of New York, supra, 49 N.Y.2d at 560, 562. Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist. Id. at 562.

Pursuant to UCC 3-804, the owner of a lost instrument may recover upon a showing of ownership, facts which prevent its production of the original, and the terms of the instrument:

> The owner of an instrument which is lost, whether by destruction, theft or otherwise, may maintain an action in his own name and recover from any party liable thereon upon due proof of his ownership, the facts which prevent his production of the instrument and its terms. The court shall require security, in an amount fixed by the court not less than twice the amount allegedly unpaid on the instrument, indemnifying the defendant, his heirs, personal representatives, successors and assigns against loss, including costs and expenses, by reason of further claims on the instrument, but this provision does not apply where an action is prosecuted or defended by the state or by a public officer in its behalf.

(emphasis added); see also Marrazo v. Piccolo, 163 A.D.2d 369 (2nd Dept. 1990); Kraft v. Sommer, 54 A.D.2d 598 (4th Dept. 1976); Gutman v. National Westminster Bank, 146 Misc. 2d 391 (Sup. Ct. N.Y. Co. 1990). Although this showing is often done at trial, the owner of a lost instrument may seek summary judgment upon making the requisite showing under UCC 3-804. Citibank, N.A. v. Benedict, 2000 WL 322785 (S.D.N.Y. 2000).

Here, plaintiff established its prima facie entitlement to summary judgment on his breach of contract, attorneys fees and personal guarantee causes of action (first, second and third). That is, it established ownership of the agreement executed by Fleet and G2 Global. See Loan Sale Agreement, Plaintiff's Exhibit J. Second, the merger between Fleet and Bank of America adequately explains the circumstances of the loss of the original agreement.

Last, the terms of the agreement were spelled out in the underwriters document, which set the loan amount at $14,000 at a rate of 9.5 percent, as well as the copy of the loan application, and the copy of the standard small business line of credit agreement attached to the Lost Instrument Affidavit (which provides for attorney fees). See Plaintiff's Exhibits E, F, & G. Last, defendant Genshaft signed the loan application, which indicated that by signing he agreed to personally guarantee the loan.[1]

Plaintiff also established its entitlement to summary judgment on its account stated claim. "An account stated is an agreement between the parties to an account based upon prior transactions between them with respect to the correctness of the separate items composing the account and that balance due, if any in favor of one party or the other." Chisholm-Ryder Co., Inc. v. Sommer & Sommer, 70 A.D.2d 429, 431 (4th Dept. 1979). "In order to establish an account stated, there must be a debtor and creditor relationship between the parties as to the items forming the account. An implicit agreement to pay, warranting summary judgment, will arise from either the absence of any objection to a bill within a reasonable time or a partial payment of the outstanding bills. Chisholm-Ryder Co., Inc. v. Sommer & Sommer, supra, 70 A.D.2d 431, 433; Paul Weiss v. Koons, 4 Misc. 3d 447 (Sup. Ct., N.Y. Co. 2004).

Here, plaintiff established that a debtor and creditor relationship existed between it an defendants by its purchase of the debt from Bank of America. Moreover, it billed defendants on December 5, 2005, and defendants did not object to the bill. Accordingly, there was an implicit agreement by defendants to pay the outstanding balance.

Having established its prima facie right to summary judgment, the burden shifted to defendants to raise triable issues of fact, which they failed to do. Zaid Alazem, a "member of G2 Global," merely avers that neither G2 Global nor Genshaft "are liable to plaintiff for any alleged amounts." He then goes on to state, contrary to UCC 3-804, that without the original agreement and guarantee, plaintiff cannot recover. Significantly, however, he never avers that any of the documents submitted by plaintiff are incorrect, that G2 Global never entered into the agreement in the first place, or that G2 Global nor Genshaft owed any outstanding balance on the agreement. Even viewing the evidence in the light most favorable to defendants, Fundamental Portfolio Advisors v. Tocqueville Asset Management, 7 N.Y.3d

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1. A guarantee is an agreement to pay a debt owed by another that creates a secondary liability and thus is collateral to the contractual obligation, Midland Steel Warehouse Corp. v. Godinger Silver Art Ltd., 276 AD2d 341 (1st Dept. 2000). The guarantor is not liable until there is a default by the principal obligor, Madison Ave. Leasehold, LLC v. Madison Bentley Associates LLC, 30 AD3d 1 (1st Dept. 2006).

96, 106 (2006), Alazem's affidavit and the general denials in the verified answer are simply insufficient to raise triable issues of fact. Based on the foregoing, plaintiff's motion for summary judgment is granted.

That portion of the motion which sought dismissal of all ten of defendants' affirmative defenses is also dismissed. All one-line defenses lacked merit. Indeed, defendants did not even address any of plaintiff's arguments with respect to this portion of the motion.

Defendant's cross-motion to dismiss the third cause of action is denied. Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment against defendants on all four causes of action is granted; and it is further

ORDERED that plaintiff contact the Clerk of this Part to schedule an attorneys fees hearing after which the Court will fix the amount of the security indemnifying the defendant pursuant to UCC 3-804, and the parties will be directed to settle judgment; and it is further

ORDERED that defendant's cross-motion is denied.

This constitutes the Decision and Order of the Court.

May 1, 2007

ENTER

SO ORDERED

Rolando T. Acosta, J.S.C.

ROLANDO T. ACOSTA
J.S.C.

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